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THE *YOUNGBLOOD* SUCCESS STORIES: OVERCOMING THE "BAD FAITH" DESTRUCTION OF EVIDENCE STANDARD

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I. INTRODUCTION

During my time at the Innocence Project, there was nothing more heartbreaking than the cases where I believed that the client was innocent but could not find the DNA evidence to support that claim.[1] Destruction of evidence is the number one problem faced by Innocence Project attorneys.[2] For various reasons, evidence in criminal cases can be lost, misplaced, or destroyed, and it is up to the defendants and the defendants' attorneys to make sense of the missing pieces.

The struggle to prove that a defendant is innocent is already a challenging task without legal standards that provide additional hurdles.[3] Yet, the United States Supreme Court, with its 1988 decision in *Arizona v. Youngblood,*[4] made the struggle even more difficult for those bringing destruction of evidence claims. In *Youngblood*, the Court created an extremely high standard, establishing that when the state destroys "potentially exculpatory" evidence before a defendant is given access to it, that action does not constitute a due process violation unless the defendant can demonstrate that the state acted in "bad faith."[5] Unfortunately, what was initially hailed as an almost "impossible" standard by critics[6] has almost proven to be just that. According to this author's research, there are 1,675 published cases that have cited *Youngblood* to date but only seven reported cases where bad faith has been found.[7]

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1 The Innocence Project at the Benjamin N. Cardozo School of Law is a non-profit legal clinic and criminal justice resource center that works to exonerate the wrongfully convicted through post conviction DNA testing and develops and implements reforms to prevent wrongful convictions. Since its inception, more than 180 people have been exonerated, including 14 sentenced to death. The author worked at the Innocence Project in the summer of 2004.

2 Telephone Interview with Colin Starger (Nov. 4, 2004).

3 *See, e.g.*, Interview with Audrey Levitin, *available at* http://www.rexfoundation.org/blog/2006/09/innocence-project.html ("The search for evidence in a case can take many years and often ends with the discovery that crucial evidence has been destroyed or has degraded after having been kept in unsuitable storage facilities.").

4 488 U.S. 51 (1988).

5 *Id.* at 58.

6 *See, e.g.*, Karen Carlson Paul, *Destruction of Exculpatory Evidence: Bad Faith Standard Erodes Due Process Rights,* Arizona v. Youngblood, ____ *U.S.* ____, *109 S. Ct. 333 (1988),* 21 ARIZ ST. L.J. 1181, 1195 (1989) ("Proving bad faith, as defined in *Youngblood*, is almost impossible.").

7 *See* Elizabeth Bawden, *Here Today, Gone Tomorrow – Three Common Mistakes Courts Make When Police Lose or Destroy Evidence with Apparent Exculpatory Value,* 48 CLEV. ST. L. REV. 335, 350 n.76 (2000) (finding only three cases of bad faith as of 2000). According to the author's research, there are 1,675 published cases that have cited *Youngblood* as of August 2006. The seven successful cases presented herein do not purport to be an exact statistical number of cases in which bad faith was found but rather are the results of the author's best research efforts.

The seven successful cases are special because they stand out amongst their peers as cases that have achieved an almost unattainable goal. However, a comparison with numerous unsuccessful destruction of evidence cases reveals that the successful cases are not particularly unique or anomalous. In fact, they raise the possibility that other cases would have been successful had they been before other courts. Because these successful cases are not peculiar or extreme, they can provide hope for those bringing destruction of evidence claims that even the most ordinary case can bring about a somewhat extraordinary outcome. In addition, there are a number of lessons to be learned from case-specific observations and common threads running through the cases. Each one provides some insight into how the cases were won and how future claims might also be successful.

This Article is intended as an aid for attorneys bringing destruction of evidence claims under the *Youngblood* bad faith standard. Attorneys researching *Youngblood* claims and seeking legal precedent will be faced with a distinct lack of cases that have successfully argued bad faith destruction of evidence. Moreover, attorneys will have difficulty unearthing those few cases that have succeeded in arguing bad faith as they have been decided at very different times by various courts. For the foregoing reasons, this Article collates the seven successful bad faith cases and highlights the reasons for their successes.

Although the *Youngblood* requirement of bad faith for destruction of evidence claims has proven to be a harsh standard for defendants, there is much to be gleaned from the seven successful cases that may prove helpful. This Article not only introduces the cases that have proven bad faith but also suggests factors that may have made them successful. The author analyzed the material for this Article by comparing and contrasting the seven successful cases with each other and with unsuccessful cases and through interviews with the defense attorneys who argued the successful cases. In this manner, this Article is intended as a primer for attorneys bringing *Youngblood* claims and most of all as a source of encouragement and hope in the face of a difficult standard.

Part II of this Article provides a summary of *Arizona v. Youngblood* and explains the methods that courts have employed to deal with the bad faith destruction of evidence standard. Part III introduces the seven cases that have successfully resulted in findings of bad faith destruction and juxtaposes each successful case with a factually similar case that was unsuccessful in proving bad faith. Part IV highlights case specific reasons for the success of the seven successful cases. Part V identifies common threads that run through each of the seven cases.

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II. THE INTERPRETATION OF *YOUNGBLOOD*

In *Arizona v. Youngblood*, a young boy was kidnapped at a carnival and later raped.[8] After the rape, the boy's clothing was collected but not properly refrigerated.[9] The defendant argued that the destruction of evidence was a violation of his due process rights.[10] However, the Court held that the evidence was only "potentially exculpatory" because the most that could be said was that the clothing would have been subjected to more testing that might have exculpated the defendant.[11] Therefore, the Court held that there was no due process violation unless the defendant could show "bad faith." The court found that the defendant did not establish bad faith because the failure of the police to preserve the samples could "at worst be described as negligent."[12]

Even though the *Youngblood* majority created a sweeping new standard,[13] the majority failed to fully clarify what constitutes "bad faith."[14] The Court said only that bad faith can be found in "those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant"[15] and that bad faith "must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed."[16] The Court provided examples demonstrating that intentional misconduct is bad faith but negligent behavior is not.[17] With only those few words of wisdom, the Court left the new *Youngblood* standard to be interpreted by future courts.

The lack of guidance provided by the Supreme Court in *Youngblood* has forced lower courts to define the complicated and unresolved relationship between *Youngblood* and its predecessor, *California v. Trombetta*.[18] In *Trombetta*, the defendant was charged with driving while intoxicated and moved to suppress evidence derived from breath-analysis tests that had been gathered and then destroyed by the state. The Court declared that in order to prove a due process clause violation, the "evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature

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8 *Youngblood*, 488 U.S. at 52.

9 *Id.* at 53.

10 *Id.*

11 *Id.* at 58.

12 *Id.* at 51.

13 *Id.* at 51.

14 *Id.*

15 *Id.* at 56.

16 *Id.*

17 *Id.* at 57.

18 467 U.S. 479 (1984).

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that the defendant would be unable to obtain comparable evidence by other reasonably available means."[19]

Courts have devised three different methods to deal with destruction of evidence claims and to explain the interaction of *Youngblood* with *Trombetta*. Yet, the methods adopted by courts have been criticized for creating further ambiguity and have led one writer to argue that courts frequently "botch their application of *Trombetta* and *Youngblood*" and to describe current applications of these standards as "blunders."[20] Compounding the situation further and perhaps reflecting the idea that the *Youngblood* and *Trombetta* relationship is still too unclear is the fact that some state courts have decided not to adopt the bad faith standard.[21] While *Youngblood* is precedent and creates a standard for federal circuits, it does not do so for state courts that interpret state constitutions and guarantees of due process under state law.[22] For this reason, many state courts do not use the bad faith standard. Instead, various balancing tests that are more indicative of whether a due process violation has occurred have been applied.[23]

Federal and state courts that have adopted *Youngblood* have devised three different approaches. The first approach makes *Youngblood* a third requirement for the *Trombetta* destruction of evidence test that was in place before *Youngblood* was decided.[24] To prove a due process violation under the *Youngblood/Trombetta* test a defendant would have to show: (a) an "exculpatory value that was apparent before the evidence was destroyed,"[25] (b) that the defendant would be "unable to obtain comparable evidence by other reasonably available means,"[26] and (c) bad faith by the government.[27] A second interpretation treats *Youngblood* and *Trombetta* as completely separate tests for two different types of evidence.[28] Under this approach, when the government destroys

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19 *Id.* at 489.

20 Bawden, *supra* note 7, at 338.

21 Currently, thirty-six states have followed *Youngblood*. *See generally* Daniel R. Dinger, *Should Lost Evidence Mean a Lost Chance to Prosecute?: State Rejections of the United States Supreme Court Decision in* Arizona v. Youngblood, 27 AM. J. CRIM. L. 329 (2000).

22 *Id.* at 342-43.

23 *See* Brent G. Filbert, *Failure of Police to Preserve Potentially Exculpatory Evidence as Violating Criminal Defendant's Rights Under State Constitution,* 40 A.L.R.5TH 113, 127.

24 *See, e.g.*, State v. Femia, 9 F.3d 990, 993-94 (1st Cir. 1993).

25 California v. Trombetta, 467 U.S. 479, 489 (1984); Bawden, *supra* note 6, at 346.

26 *Trombetta*, 467 U.S. at 489; *see also* Bawden, *supra* note 7, at 346.

27 *Youngblood*, 488 U.S. at 56-58; *see also* Bawden, *supra* note 7, at 346.

28 *See* Bawden, *supra* note 7, at 347-48 (describing an approach that only requires bad faith for evidence that is not material under *Trombetta*, writing, "A different response is that Samek is not required to prove bad faith because the lost Tape had apparent exculpatory value. Bad faith is only required when government agents fail to preserve evidence whose exculpatory value is indeterminate."); s*ee, e.g.*, State v. Greenwold, 525 N.W.2d 294, 297 (Wis. 1994) ("A defendant's due process rights are violated if the police: (1) failed to preserve the evidence that is apparently ex-

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"potentially useful evidence," *Youngblood* applies and bad faith is required for a due process violation finding.[29] *Trombetta* is used separately in claims involving evidence with "apparent exculpatory value" before destruction and does not require a showing of bad faith.[30] A third interpretation is beginning to be used by courts after the Supreme Court's most recent destruction of evidence ruling in *Illinois v. Fisher*.[31] This approach requires bad faith for all claims but not a showing that the evidence was apparently exculpatory.[32] Cases discussed throughout this Article utilize one of these three methods, and reference will be made when the method used impacted the overall success of the case.

No matter which interpretation courts use, though, the *Youngblood* bad faith standard is a difficult test to pass. However, rising out of the numerous interpretations and confusion are the seven successful cases: *United States v. Cooper*,[33] *United States v. Bohl*,[34] *Stuart v. State*,[35] *United States v. Elliott*,[36] *State v. McGrone*,[37] *State v. Benson*,[38] and *United States v. Yevakpor*.[39]

III. SEVEN CASES, NEITHER UNIQUE NOR ANOMALOUS

This Part of the Article demonstrates that the successful cases are not so different from cases with similar facts or reasoning that were unsuccessful in establishing bad faith. Each successful case is juxtaposed with a factually similar case that was unsuccessful in arguing bad faith. In this manner, the seven successful cases can serve as a source of hope for defendants and demonstrate that despite the trends in the developing *Youngblood* doctrine that present obstacles for defendants, these seven have been able to clear paths and find triumph where their peers have not. The seven successful cases do not have extraordinary fact patterns and do not have obviously due process-violative destruction of evidence, but instead are ordinary cases, the same brought every day by defendants that lose in their *Youngblood* attempts. The analysis in this Part demon-

culpatory; or (2) acted in bad faith by failing to preserve evidence which is potentially exculpatory.").

29 *See* Bawden, *supra* note 7, at 347-48 ("A different response is that Samek is not required to prove bad faith because the lost Tape had apparent exculpatory value. Bad faith is only required when government agents fail to preserve evidence whose exculpatory value is indeterminate.").

30 *See id.* at 346-47.

31 540 U.S. 544, 548-49 (2004).

32 *Id.*

33 983 F.2d 928 (9th Cir. 1993).

34 25 F.3d 904 (10th Cir. 1994).

35 907 P.2d 783 (Idaho 1995).

36 83 F. Supp. 2d 637 (E.D. Va. 1999); *see also* Robles v. State, 85 S.W.3d 211, 216-17 (Tex. App. 1999).

37 798 So. 2d 519 (Miss. 2001).

38 788 N.E.2d 693 (Ohio Ct. App. 2003).

39 419 F. Supp. 2d 242 (N.D.N.Y. 2006).

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strates that despite the numerous unsuccessful cases, attorneys and defendants bringing *Youngblood* claims will discover, those cases might have been successful if brought before other courts.

The successful cases are discussed separately and in the order they were decided. Each discussion begins with an introductory paragraph that explains why the case might appear to have been successful and unique or anomalous and then introduces the name of a case (cases) that had a similar fact pattern but was not successful. The introductory paragraph is followed by a more detailed discussion of the facts and reasoning of the successful case and an equally in-depth presentation of the facts and reasoning of the unsuccessful case(s).

A. United States v. Cooper

United States. v. Cooper appears to be a unique case that was successful in proving bad faith because the state was put on notice by the defendant's attorney that the evidence should be preserved and the state nevertheless destroyed it.[40] When asked why he thought the defendant was successful in showing bad faith, Dwight Samuel, Cooper's attorney for the appeal before the Ninth Circuit, said he believed that the request to preserve the evidence was key and that there was strong evidence that the state ignored the request and thus acted in bad faith.[41] However, in a case similar to *Cooper* (in its focus on the notice issue), a court found that notice is irrelevant. In *Illinois v. Fisher*, the United States Supreme Court succinctly rejected the idea that bad faith is proven when it is shown that the state destroyed evidence after it had been asked to save it.[42]

In *Cooper*, defendants Cooper and Gammill owned and managed a lab that was used for manufacturing dextran sulfate.[43] The Drug Enforcement Agency ("DEA") determined that the lab was producing methamphetamine and charged both Cooper and Gammill.[44] The DEA collected two large vats that were supposedly being used to manufacture the illegal substance and removed them from the lab.[45] On December 8, Gammill called the DEA and said that he needed the equipment back.[46] On December 12, Gammill's attorney contacted the DEA and demanded that the vats be preserved and returned.[47] However, on December 21, the DEA had them destroyed.[48] On appeal before the Ninth Circuit, the state did not contest the bad faith allegation but instead argued that

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40 983 F.2d 928, 929-30 (9th Cir. 1992).

41 Telephone Interview with Dwight Samuel (Mar. 25, 2005).

42 *See generally* Illinois v. Fisher, 540 U.S. 544 (2004).

43 *Cooper*, 983 F.2d at 929-30.

44 *Id.*

45 *Id.*

46 *Id.* at 930.

47 *Id.*

48 *Id.*

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there was no due process violation because the defendants could have obtained comparable evidence.[49] The court rejected this argument and found that there was a due process violation and dismissed the indictment against Cooper and Gammill.[50]

The fact that the state essentially gave up on the bad faith issue makes *Cooper* a particularly interesting case. It seems that, like Mr. Samuel, the state believed that bad faith was undeniable in this case. However, perhaps if the state had known how courts have disagreed over the effect that giving notice should have on the issue of bad faith, it would not have given up so quickly.

In *Fisher*, a later case, the United States Supreme Court considered a similar issue but made the opposite finding of that made in *Cooper*. In *Fisher*, the defendant, Fisher, was charged with possession of cocaine and then filed a motion for discovery requesting access to all evidence the state intended to use at trial. The state said the evidence would be turned over at a reasonable time.[51] Fisher failed to appear at trial and became a fugitive for more than a decade. During the time that he was missing, the state destroyed the white powdery substance that was allegedly cocaine.[52] Yet, when Fisher was captured again the state reinstated the cocaine possession charges and convicted him.[53] Fisher appealed arguing that his due process rights were violated. The Supreme Court found that his due process rights were not violated because there was no evidence of bad faith. The Court found that the presence of the discovery request had no bearing on the bad faith issue.[54]

Thus, *Cooper* and *Fisher* demonstrate how similar factual situations can bring about very different outcomes. The Supreme Court in *Fisher* found that the state's destruction of evidence in defiance of a defendant's request did not amount to bad faith.[55] Yet in *Cooper*, an earlier case that was argued before the Supreme Court ruling in *Fisher* came down, the state did not believe it even had a chance in contesting the bad faith allegation after it destroyed evidence in defiance of the defendant's requests, thereby resulting in a finding of bad faith.[56] *Cooper* then, a case that was successful in arguing bad faith, did not even have to argue bad faith, whereas *Fisher*, an unsuccessful case, was deemed to be making an argument that had no bearing on the issue.[57] This case and the other cases in this Part illustrate the diverse treatment *Youngblood* claims will receive, despite similar factual situations.

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49 *Id.* at 931.

50 *Id.* at 933.

51 Illinois v. Fisher, 540 U.S. 544, 545 (2004).

52 *Id.* at 545-46.

53 *Id.* at 545.

54 *Id.* at 548.

55 *Id.*

56 United States v. Cooper, 983 F.2d 928, 929-30 (9th Cir. 1992).

57 *Id.*

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B. United States v. Bohl

United States v. Bohl is a case that seems to have been successful for two reasons.[58] The first reason is that the state was put on notice that the evidence should be saved.[59] The second reason is that the defendants requested access to evidence before it was destroyed.[60] Thus, the state could have responded to the defendants' timely request and saved the evidence.

However, there are two cases that have similar factual situations but different outcomes. First, *Fisher* again stands in stark contrast as a case that was not successful despite the fact that the state was put on notice that the evidence should be saved. Second, *United States v. McClure* is a case that can be contrasted with *Bohl* because the *McClure* court found that even if the evidence was requested before the state destroyed it, there was no bad faith.[61]

In *Bohl*, the defendants contracted to build radio transmission towers for the Federal Aviation Administration ("FAA").[62] The FAA ultimately concluded that defendants had used nonconforming steel in manufacturing the towers and brought criminal charges against Bohl and Bell.[63] The FAA took possession of the questionable tower legs and tested them.[64] Bohl and Bell requested access to the material numerous times between October 1988 and October 1990 but did not receive a response from the FAA until October 1990 when it turned over an eighteen-inch portion of one of the legs.[65] In November of 1990 the government admitted that the actual towers could not be located.[66] The court found that the towers were destroyed in bad faith for five reasons, the first of which involved the notice issue.[67] The court expressed its frustration with the state's avoidance of the defendants' requests.[68] The court explained:

> [i]n evaluating the good or bad faith of the government when it disposed of this evidence, we note first that the government was explicitly placed on notice that Bell and Bohl believed the tower legs were potentially exculpatory. Bell and Bohl repeatedly

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58 United States v. Bohl, 25 F.3d 904, 906-08 (10th Cir. 1994).

59 *Id.* at 907-08.

60 *Id.*

61 United States v. McClure, No. 90-5001, 1990 U.S. App. LEXIS 20371, at *18 (4th Cir. Nov. 21, 1990).

62 *Bohl*, 25 F.3d at 906-08.

63 *Id.*

64 *Id.* at 907.

65 *Id.* at 907-08.

66 *Id.* at 908.

67 *Id.* at 911.

68 *Id.*

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> sent letters to, and met with, the FAA to request access to the allegedly nonconforming towers.[69]

Thus, the notice issue was clearly an influential component of the court's bad faith determination, and it appears to be a reason why *Bohl* was successful.

However, the court in *Fisher* considered an issue similar to the one in *Bohl* and made the opposite ruling.[70] As previously discussed, *Fisher* held that notice provided by the defendant's filing of a discovery motion and the subsequent destruction by the state was not proof of bad faith.[71] Therefore, although the court in *Bohl* found that the state's destruction in defiance of a defendant's request is evidence of bad faith, the court in *Fisher* found that it was not.[72]

Another reason *Bohl* appears to have been successful is that at the time the defendants made their requests, the government had the ability to save the evidence.[73] When asked why he believed this case was successful in proving bad faith, John Dowdell, Bohl's attorney, said he believed that one of the most compelling factors was that if the government had responded sooner the defendants could have saved the evidence, tested it, and possibly proven their innocence.[74] The Tenth Circuit highlighted this in its opinion.[75] One reason the court gave for finding bad faith is that "the record reveals that the government still had possession or the ability to control the disposition of the tower legs at the time it received notice from Bell and Bohl about the tower legs' potential exculpatory value."[76]

However, in *McClure*, the Fourth Circuit examined a case with a similar situation but came to the opposite conclusion.[77] In *McClure*, the defendant was charged with conspiracy to rob a bank and was accused of scouting out the bank on a particular day.[78] An FBI agent investigating the allegations viewed a surveillance videotape of the day in question but found the picture blurry and unclear and left it at the bank.[79] When McClure requested that the government turn over the tape so that he could view it, the government implied that the tape was in government files.[80] Meanwhile, the tape was actually in the bank's pos-

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69 *Id.*

70 Illinois v. Fisher, 540 U.S. 544, 545 (2004).

71 *Id.*

72 *Id.*

73 *Bohl*, 25 F.3d at 912.

74 Telephone Interview with John Dowdell (Apr. 27, 2005).

75 *Id.*

76 *Bohl*, 25 F.3d at 912.

77 United States v. McClure, No. 90-5001, 1990 U.S. App. LEXIS 20371, at *18 (4th Cir. Nov. 21, 1990).

78 *Id.* at *1.

79 *Id.*

80 *Id.*

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session.[81] Eventually the defendant learned not only that the bank had custody of the evidence but also that it had erased or retaped over the footage.[82]

Like Bohl and Bell, McClure argued that the government's delayed response suggested bad faith because had he been notified sooner he could have saved the evidence and viewed it.[83] Unlike the Tenth Circuit, the court in *McClure* found this argument unavailing.[84] The court held, "if the footage did exist during the time motions were made and the government's response foreclosed McClure's opportunity to gain it from the bank, he shows no bad faith by the government, but rather, at the most, negligence."[85] Thus, whereas the court in *McClure* found that a belated answer from the state could at most only demonstrate negligence, the court in *Bohl* found the state's delayed response to be indicative of bad faith.[86]

Although *Bohl* was factually similar in certain regards to *Fisher* and *McClure*, *Bohl* merited an opposite outcome. These comparisons demonstrate that defendants should not give up on two arguments: notice that evidence should be saved, and more specifically, requesting access to evidence before it is destroyed.

C. Stuart v. State

Stuart v. State could be viewed as a case that was successful in proving bad faith because the government disclosed the existence of evidence but turned the evidence over to the defendant with gaping holes.[87] The *Stuart* court emphasized that the missing evidence could have been exculpatory.[88] This fact pattern is analogous to the facts in *United States v. Femia*,[89] where the state disclosed evidence with missing portions and yet bad faith was not found.

In *Stuart*, the defendant was convicted of first degree murder by torture and was sentenced to death.[90] After he was arrested and placed in custody, he spoke several times with his attorney on the telephone about his case.[91] He revealed to his attorney the names of three women with whom he had previously had relationships and told his attorney that the state would not be able to locate

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81 *Id.*

82 *Id.*

83 *Id.* at *3.

84 *Id.* at *6-7.

85 *Id.*

86 *Id.*

87 State v. Stuart, 907 P.2d 783 (Idaho 1995).

88 *Id.*

89 9 F.3d 990 (1st Cir. 1993).

90 *Stuart*, 907 P.2d at 783.

91 *Id.*

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them.[92] The state did find the women, and they testified against the defendant at trial.[93] On appeal, Stuart argued that the sheriff's department obtained the names of the women who testified by recording his telephone conversation with his attorney.[94] In response, the state turned over its phone logs with missing portions.[95] In addition, the district court found that one of Stuart's phone conversations with his sister had been recorded but not disclosed.[96] Although the court found that the defendant's conversation with his sister was not material to the case itself, the court found that the conversation would have shown that his calls were being recorded and "would potentially have led to suppression of evidence of Stuart's prior relationships that was introduced at trial."[97] Thus it was "indirect[ly]" exculpatory.[98] The *Stuart* court held that the failure to disclose the potentially exculpatory conversation with the other phone records amounted to bad faith.[99]

The court in *Femia*, however, considered an issue similar to the one in *Stuart* and made the opposite ruling.[100] In *Femia*, the DEA was investigating a claim that the defendant was a cocaine supplier.[101] The DEA recorded twenty-four phone calls made by the defendant, but transcripts were only made for eight of the twenty-four calls.[102] Shortly thereafter, a DEA agent destroyed all the original tapes, an act that the district court found to be "gross negligence" and not bad faith.[103] The destruction of the originals, however, was not considered by the court in *Femia*.[104] Instead, the court examined whether the surrendering of the transcripts with fourteen calls missing from the record constituted bad faith.[105] The court determined that the state did not act in bad faith because it fulfilled its *Brady* obligation by disclosing the evidence it had, and because the content of the missing portions was unknown. The court held:

> We do not know, and never will know, the content of statements that may have been lost. Contrary to the district court's decision, no due process violation has occurred. The govern-

92 *Id.* at 786.

93 *Id.*

94 *Id.* at 785-86.

95 *Id.* at 789.

96 *Id.*

97 *Id.* at 793.

98 *Id.*

99 *Id.*

100 United States v. Femia, 9 F.3d 990 (1st Cir. 1993).

101 *Id.*

102 *Id.* at 990-92.

103 *Id.* at 992.

104 *Id.*

105 *Id.* at 992 n.3.

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> ment has disclosed the transcript evidence allegedly possessing exculpatory value, as required by *Brady* and its progeny. The lost audio portion and statements not transcribed are only potentially exculpatory, and the failure to retain that evidence does not violate Femia's due process rights because the government did not destroy the evidence in bad faith.[106]

Thus, the holding in *Femia* is inconsistent with the holding in *Stuart*. Although *Femia* found that the nondisclosure of missing, potentially exculpatory evidence is not in itself proof of bad faith, the court in *Stuart* found that the nondisclosure of some evidence that could have had an exculpatory effect rises to the level of bad faith.

D. United States v. Elliott

United States v. Elliott appears to have been unique and successful in proving bad faith for two reasons.[107] The first reason is that the state's actions were either reckless or grossly negligent.[108] The second reason is that the state disregarded established government policy.[109] However, there are cases where courts have considered similar situations and held that each of those do not amount to bad faith. First, *People v. Danielly*[110] is a case where the court found that mere reckless behavior is not sufficient to prove bad faith and that bad faith requires ill will or sinister motive. Second, *Lovitt v. Warden*[111] is a case where disregard of established policy by a state agent does not amount to bad faith.

In *Elliott*, the defendant, Elliott, was charged with conspiracy to possess, distribute, and manufacture methamphetamine.[112] When Elliott committed a traffic infraction, he was stopped and his vehicle was searched by police.[113] The police found materials they believed were used to make methamphetamine. Some of those materials were tested for the presence of fingerprints.[114] After testing, a DEA agent ordered their disposal.[115] The DEA agent used the fingerprint testing results when he testified before the grand jury and an indictment followed.[116] Elliott contended that the destruction of the materials with finger-

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106 *Id.* at 995.

107 United States v. Elliott, 83 F. Supp. 2d 637 (E.D. Va. 1999).

108 *Id.*

109 *Id.*

110 653 N.E.2d 866 (Ill. App. Ct. 1995).

111 585 S.E.2d 801 (Va. 2003).

112 *Elliott,* 83 F.Supp. 2d at 639.

113 *Id.*

114 *Id.* at 640-41.

115 *Id.* at 640.

116 *Id.* at 641.

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prints was a bad faith violation.[117] The court agreed and found that the agent recklessly disregarded applicable government policy.[118] The court held:

> [W]here the law enforcement officer acted in a manner which was either contrary to applicable policies and the common sense assessments of evidence reasonably to be expected of law enforcement officers or was so unmindful of both as to constitute the reckless disregard of both, there is a showing of objective bad faith sufficient to establish the bad faith requirement of the *Trombetta/Youngblood* test.[119]

Thus the court found that recklessness could amount to bad faith.

Yet in *Danielly*,[120] a court considered a similar issue but made the opposite ruling. In *Danielly*, the defendant, Danielly, was charged with raping a woman.[121] The woman claimed that while they were in his basement he forcibly beat and raped her, but Danielly claimed that they consensually had intercourse and that afterwards they had an altercation which lead to them physically hitting and pushing each other.[122] Two days after the attack the woman went to the police and asked for her belongings.[123] She was given everything, including her allegedly torn undergarments.[124] Danielly claimed that the underwear should have been held by the police because he could have used them at trial to show that they were not torn, thereby proving that the intercourse had been consensual.[125] He argued that the failure to save them was a *Youngblood* violation.[126] The court, however, did not find bad faith. The court found that "bad faith implies a furtive design, dishonesty, or ill will," and "[b]ecause there is no evidence that the police acted with a 'sinister motive' or with 'ill will' in returning the victim's underwear to her, we reject defendant's arguments."[127] Thus, the bar set by the *Danielly* court with their definition of bad faith is much higher than that set by the court in *Elliott*. Although the legal issue was the same for the *Danielly* court, it analyzed the situation much differently. Where the court

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117 *Id.*

118 *Id.*

119 *Id.* at 647-48.

120 People v. Danielly, 653 N.E.2d 866 (Ill. App. Ct. 1995).

121 *Id.*

122 *Id.*

123 *Id.*

124 *Id.* at 868.

125 *Id.*

126 *Id.* at 869.

127 *Id.* at 870.

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in *Danielly* required an actual purposeful and evil intent to show bad faith,[128] the *Elliott* court found a claim of ignorance to be no excuse.[129]

In *Lovitt*, a court considered the issue of a state agent's disregard of policy but made a different ruling than the court in *Elliott*. In *Lovitt*, the defendant was convicted of robbery and capital murder during the commission of a robbery. Lovitt filed a writ of habeas corpus and raised the issue of the wrongful destruction of evidence in his case.[130] After his conviction, the chief deputy clerk in charge of the case destroyed all the evidence from the defendant's case.[131] Although a law had just been passed twenty days earlier mandating the preservation of all human biological evidence in felony cases, and even though two other clerks warned the deputy clerk that he should not destroy the evidence, the deputy clerk had the evidence disposed of anyway.[132] The court found that "although [the code] became effective 20 days before entry of the destruction order, the Chief Deputy Clerk was unaware of the statute's provisions when the evidence was destroyed."[133] Thus, where the *Lovitt* court excused a disregard of a statute because a state actor claimed he did not know about it, the *Elliott* court found ignorance to be no excuse.

E. State v. McGrone

State v. McGrone appears to be uniquely successful in proving bad faith because the state did not appear in court to explain the destruction of evidence.[134] The police who were subpoenaed by the court failed to appear, and the state took their reticence and absence to be evidence of bad faith.[135] However, in *United States v. Solis,* the United States District Court for Kansas considered a similar situation but decided that regardless of whether the state could offer an innocent explanation, the burden of proving bad faith was solely on the defendant, and thus, found no bad faith.[136]

In *McGrone*, the defendant was charged with motor vehicle theft and two counts of aggravated assault on law enforcement officers.[137] While the defendant was driving a stolen vehicle, police set up a roadblock in an attempt to stop him. After crashing the vehicle, the defendant attempted to flee on foot, and officers again tried to stop him. At some point during the altercation the

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128 *Id.*

129 United States v. Elliott, 83 F. Supp. 2d 637, 647-48 (E.D. Va. 1999).

130 Lovitt v. Warden, 585 S.E.2d 801 (Va. 2003).

131 *Id.* at 808.

132 *Id.* at 809-10.

133 *Id.* at 810.

134 State v. McGrone, 798 So. 2d 519 (Miss. 2001).

135 *Id.*

136 United States v. Solis, 55 F. Supp. 2d 1182 (D. Kan. 1999).

137 *McGrone,* 798 So. 2d at 521.

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defendant was shot once in the leg by an officer.[138] The officer claimed that as he was reaching for his weapon, the defendant lunged at him and tried to grab his arm. The defendant claimed that he was in the process of running away from the officers and that the gun residue on his pants would prove that he was fleeing.[139] After his capture, the police took possession of all of McGrone's clothing and possessions.[140] The police lost McGrone's pants, and McGrone alleged that there was bad faith destruction.[141] Although McGrone had subpoenaed the police officers, the officers never appeared in court.[142] The *McGrone* court found that the officers prevented the defendant from presenting his case and held, "[w]here the State's actions absolutely prevent a defendant in a criminal case from presenting proof on this issue, we will consider the requirement of bad faith to have been proven."[143]

The court in *Solis*, however, considered a similar issue but made the opposite finding.[144] In *Solis*, the defendants were charged with drug trafficking and alleged cocaine and marijuana substances were collected by the government and placed in a locker in the county sheriff's office.[145] The defendants alleged that while the evidence was in the state's custody, Oblander, a deputy in the sheriff's office, tampered with the evidence.[146] Oblander's alleged tampering with other evidence in the same room was an issue in another case.[147] Deputy Oblander did not testify at trial about his behavior,[148] and the court did not find that there was a bad faith destruction of evidence.[149] Instead, the court found that if Oblander, who allegedly had a substance abuse problem, did tamper with the evidence, his actions would tend to show that he did not believe the evidence was exculpatory (as is required by courts that use the *Youngblood/Trombetta* test), and instead it would show that he knew it was inculpatory.[150] Furthermore, the court held, "[r]egardless whether [sic] the government can offer an innocent explanation for evidence being destroyed or altered, the burden of proof on bad faith remains on the defendants."[151] Because the defendant only

138 *Id.*

139 *Id.* at 520-21.

140 *Id.* at 521.

141 *Id.*

142 *Id.* at 523.

143 *Id.*

144 United States v. Solis, 55 F. Supp. 2d 1182 (D. Kan. 1999).

145 *Id.* at 1183.

146 *Id.* at 1183-84.

147 *Id.*

148 *Id.*

149 *Id.* at 1189.

150 *Id.* at 1188 (saying "instead, the alleged conduct of Deputy Oblander tends to show knowledge that the evidence was inculpatory rather than exculpatory").

151 *Id.*

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attempted to call into question the state's behavior and lack of explanation, the court found no bad faith or due process violation.[152] Thus, *McGrone* and *Solis* are factually similar, but where the *Solis* court found that a lack of innocent explanation is irrelevant, the *McGrone* court found that it can be taken as evidence of bad faith.[153]

F. State v. Benson

State v. Benson is a case that appears to have been successful because the government was evasive about the existence of evidence.[154] *Benson* can be compared with two other cases, *State v. McClure* and *United States v. Brimage*, in which the government acted and spoke inconsistently in regards to evidence and appeared to be hiding something, and yet bad faith was not found.

In *Benson*, the defendant, Benson, was convicted for operating a vehicle under the influence of alcohol. Benson filed a demand for discovery and later a motion to disclose any videotape evidence. Benson was told that no videotape evidence existed.[155] However, in March 2002, at a hearing on the motions, evidence came to light through the evasive testimony of the officer who had arrested Benson that a videotape had in fact existed.[156] First, the officer testified that there was no videotape.[157] Then he testified that his car was equipped with a camera, but that he was not sure if it was on when the defendant was arrested.[158] After more questioning, the officer said that the videotape was on but that the field sobriety test probably was not recorded because of the location of the camera, and he further explained that he did not look for the tape when he was asked to do so by the prosecutor.[159] Later at trial, in June 2002, the officer established that the tape had been destroyed earlier in the year.[160]

The court found that the officer had acted in bad faith. For the *Benson* court, the officer's dishonesty with the prosecution about the existence of the tape and later evasiveness in court amounted to "a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud . . . actual intent to mislead or deceive another."[161]

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152 *Id.* at 1188-89.

153 *Id.*; State v. McGrone, 798 So. 2d 519, 522-23 (Miss. 2001).

154 State v. Benson, 788 N.E.2d 693 (Ohio Ct. App. 2003).

155 *Id.*

156 *Id.*

157 *Id.*

158 *Id.* at 697.

159 *Id.*

160 *Id.*

161 *Id.* at 696.

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Yet, for other courts, similar behavior has been regarded as far less severe and calculating. As previously discussed, in *McClure*, the defendant was charged with conspiracy to rob a bank.[162] A government agent investigating the allegations viewed a surveillance videotape of the alleged day, but left it at the bank.[163] When McClure requested that the government turn over the tape so that he could view it, the government implied that the tape was in government files.[164] Meanwhile, the tape was actually in the bank's possession.[165] Eventually the defendant learned not only that the bank had custody of the evidence but also that it had erased or retaped over the footage.[166]

In *Benson*, the court found the government's confusing and contradictory responses regarding the existence of evidence to be proof of bad faith.[167] In *McClure*, however, ambiguous and contradictory responses amounted to no more than negligence, not bad faith.[168] In *McClure*, on June 7, the defendant submitted a motion to compel disclosure of the videotape and noted that government files did not contain the tape, which he believed to be *Brady* material.[169] In response, on June 13, the government made a statement that the court characterized as being of "questionable accuracy" as to the videotape's existence and implied that the government was in possession of the videotapes.[170] Then, on June 26, the government submitted a further response, admitting that it did not in fact possess the tape.[171] The *McClure* court found that this behavior was not indicative of bad faith.[172] The court held that, at the time of the government's questionable responses, either the tape did or did not exist.[173] If it had already been destroyed, then the government's misleading response made no difference.[174] In a "there's no use crying over spilled milk" type of argument, the court held that McClure would not have been able to use the destroyed evidence at trial anyway. Also, even if the tape did exist, the court found that the most McClure could show was negligence by the government, not bad faith.[175]

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162 United States v. McClure, No. 90-5001, 1990 U.S. App. LEXIS 20371, at*1-2 (4th Cir. Nov. 21, 1990).

163 *Id.*

164 *Id.*

165 *Id.* at *6-7.

166 *Id.*

167 State v. Benson, 788 N.E.2d 693, 696 (Ohio Ct. App. 2003).

168 *McClure*, 1990 U.S. App. LEXIS 20371, at *4-5.

169 *Id.*

170 *Id.* at *5-6.

171 *Id.* at *6.

172 *Id.* at *10-12.

173 *Id.* at *14-15.

174 *Id.* at *17-18.

175 *Id.*

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Benson can also be compared with *Brimage*, a case in which the defendant was convicted of possession of a firearm and ammunition.[176] Government officials monitored the defendant and other suspects during a sting operation.[177] The defendant argued that the police acted in bad faith in monitoring but not recording conversations during the sting and that the conversations were potentially exculpatory.[178] Unlike the *Benson* court, the *Brimage* court found that conflicting responses from the government were not in bad faith.[179] In *Brimage*, before the trial, the officer responsible for not recording the conversations testified that he did not record because he believed the recordings would be inadmissible in state court.[180] At trial, he gave a different reason, stating, "I didn't think I would have to rely on anything that was said in order to convict the both [sic] suspects."[181] Although the court acknowledged that the district court had referred to the responses as "lame" and that the responses were "somewhat different," the court found that there was no bad faith.[182]

Thus, *Benson* appears to be a unique case that was successful in arguing bad faith because the state was evasive about the existence of evidence. However, though *Benson* had an outcome different from those in *McClure* and *Brimage*, the three cases are factually similar.

G. United States v. Yevakpor

United States v. Yevakpor appears to have been successful because, similar to *Stuart*, the government turned over incomplete evidence.[183] Yet, *Yevakpor* goes two steps further in that the government not only provided incomplete evidence during discovery, as was the case in *Stuart*, but also was going to present the evidence in its case at trial, and in that unlike the police in *Stuart*, the agents in *Yevakpor* admitted that they selectively chose portions of the evidence to save and portions to destroy.[184] However, the facts of *Yevakpor* are not dissimilar to those in *United States v. McInnch*, a case which resulted in a finding of no bad faith where the government admitted to selectively saving only certain portions of a piece of evidence and destroying the rest while intending to use the evidence at trial.[185]

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176 United States v. Brimage, 115 F.3d 73 (1st Cir. 1997).

177 *Id.* at 75-76.

178 *Id.* at 74.

179 *Id.* at 77-78.

180 *Id.* at 77-78.

181 *Id.* at 78.

182 *Id.*

183 United States v. Yevakpor, 419 F. Supp. 2d 242, 244-45 (N.D.N.Y. 2006).

184 *Id.* at 244-46.

185 United States v. McInnch, No. 7:01-CR-00020, 2001 U.S. Dist. LEXIS 14063 (W.D. Va. Aug. 31, 2001).

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In *Yevakpor*, the defendant was indicted on two felony counts for attempted importation and possession with intent to distribute a controlled substance.[186] The government intended to introduce at trial three one-minute video segments that were recorded at the government's facility as part of a routine recording system.[187] The segments that were saved by the government allegedly showed the defendant giving materials to a companion while the agents searched his suitcase and showed the defendant attempting to use his cellular phone.[188] At the direction of a supervisory agent, only about three minutes of video were actually saved by the government, with about twenty-two minutes of footage missing from the tapes.[189] The defendant made a motion *in limine* to exclude the samples of video, and the court agreed with the defendant.[190] The court found that the preservation of only 12.5% of the videotapes at the direction of a supervisory agent gave the appearance of impropriety on the part of the government.[191] The court found that there was sufficient evidence of bad faith.[192] Although the court could not determine the exact amount of missing footage or whether the missing segments would have proven exculpatory for the defendant, the court did not believe that the government would destroy evidence that was helpful to its case.[193] The missing evidence was described as being "at best, neutral and, at worst, adverse to the Government's case or of an exculpatory nature for the defendant."[194] The court believed that the defendant should have been given a chance to review and decide the value of the evidence for himself.[195]

However, in *McInnch* a court considered a similar issue but came to a very different conclusion.[196] In *McInnch*, the defendant was charged with three counts of arson for allegedly setting fire to several welcome mats.[197] Investigators removed only a portion of each of the mats and left the remainder at the scene.[198] By the time the case came before the court, the remainder of the mats were unavailable.[199] The defendant moved to suppress the mats, arguing that by

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186 *Yevakpor*, 419 F. Supp. 2d. at 244-45.

187 *Id.* at 243-44.

188 *Id.* at 245-46.

189 *Id.* at 245.

190 *Id.*

191 *Id.* at 247.

192 *Id.* at 247-48.

193 *Id.*

194 *Id.* at 247.

195 *Id.*

196 United States v. McInnch, No. 7:01-CR-00020, 2001 U.S. Dist. LEXIS 14063 (W.D. Va. Aug. 31, 2001).

197 *Id.* at *1.

198 *Id.*

199 *Id.*

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taking only a small sample of the mats and destroying the rest, the government deprived him of evidence in violation of *Youngblood*.[200] Contrary to the court in *Yevakpor*, the court in *McInnch* found that it had not been established that taking a portion of evidence but not the rest qualifies as destruction of evidence.[201] The court held, "[i]t is not clear that the government's failure to preserve the entire mat is the same thing as destroying evidence."[202] Interestingly then, where the court in *Yevakpor* based the heart of its bad faith ruling on the fact that the government chose to save only a small portion of evidence and took for granted that taking only a sample of evidence to the exclusion of the rest is a destruction of evidence claim, the *McInnch* court was unsure of whether taking a small sample even qualified for a *Youngblood* analysis.[203]

Yevakpor is unique and seems to have been successful in proving bad faith because the police selectively chose to save only certain portions of evidence that it was going to present at trial. However, *Yevakpor* is not factually dissimilar to *McInnch*, where a court found that the preservation of only a portion of evidence may not even qualify for *Youngblood* relief.[204]

The seven successful cases appear to be unique and anomalous for various reasons. These cases have been able to successfully argue bad faith claims where others have not. However, the seven successful cases are ordinary cases and the type of claims that defendants bring every day. They are factually similar to other cases that were unsuccessful in proving bad faith. Yet, for certain reasons, the defendants in these seven cases were able to argue successfully for relief and thus overcome their ordinary natures to merit extraordinary outcomes. To discover the reasons for the seven cases' success, several case-specific factors and themes running through all the cases must be examined.

IV. LESSONS TO BE LEARNED FROM THESE CASES

There are lessons to be learned from the successful cases. Case-specific reasons for their successes can be found by looking deeply and may prove helpful in understanding how to win *Youngblood* claims. This Part consists of five lessons that can be learned from case-specific observations: publicity can be helpful in establishing bad faith, the size and type of evidence can help in establishing bad faith, incomplete or missing portions of evidence may affect bad faith, putting the state on notice that evidence must be saved may be important, and recklessness or extreme negligence may lead a court to make a finding of bad faith.

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200 *Id.* at *2-3.

201 *Id.* at *4-5.

202 *Id.* at *5.

203 *Id.*

204 *Id.*

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A. Publicity

In February 1995, the Supreme Court of Idaho made a finding of bad faith in *Stuart*.[205] By that time the murder trial of Gene Francis Stuart had already been highly publicized.[206] The media frenzy surrounding the case had, up until that point, seemed to be working against Stuart. Stuart had been accused of murdering the two-year-old son of his girlfriend and was convicted of the crime in 1981.[207] The child, Robert, was not yet toilet trained, and Stuart, who was known to be a strict disciplinarian, often expected almost adult behavior from the child. Stuart admitted to resorting to physical violence to punish Robert.[208] On September 19, 1981, Robert was alone with Stuart at Stuart's apartment. When Robert refused to eat his food, Stuart began poking the child and even struck the boy in his chest.[209] A short while later, Stuart noticed that Robert was breathing unusually and took him to the hospital. Robert died from internal hemorrhaging caused by the rupture of the liver.[210] Stuart was charged with first degree murder by torture.[211]

The *Lewiston Morning Tribune* was a local newspaper that gave extensive coverage of the case.[212] Articles from the *Tribune* included titles such as: "Nurse tells of efforts to save boy," "Women testify that Stuart beat, choked them," "Stuart admits striking boy with his fist," and "Prosecution wins dispute in Stuart murder trial."[213] As a result, Stuart asked the court for a change of venue outside the circulation area of the *Lewiston Morning Tribune*.[214] However, instead of taking the case outside the area of that paper, the court moved it to Moscow, Idaho.[215] According to Bob Kinney, who was Stuart's attorney before the Supreme Court of Idaho, there were even more readers of the *Lewiston Tribune* in Moscow than there were in Orofino, the original location of the trial.[216] It is not surprising that not only was he convicted at trial but that on his first appeal for post-conviction relief the Supreme Court denied his claims. The publicity could have only served to help convict Stuart at the trial level. Furthermore, it could have done nothing to help his cause at the post-conviction level when he first made claims such as "there was insufficient evidence to war-

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205 State v. Stuart, 715 P.2d 833 (Idaho 1985).

206 *Id.* at 837.

207 *Id.* at 835-36.

208 *Id.*

209 *Id.* at 836.

210 *Id.*

211 *Id.* at 835.

212 *Id.* at 837.

213 *Id.* at app. A.

214 *Id.* at 837.

215 *Id.*

216 Telephone Interview with Robert Kinney (Apr. 7, 2005).

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rant a jury instruction and verdict based on first degree murder by torture."[217] If any judge or juror had even caught a glimpse of one of the *Tribune*'s articles, doubt would immediately be cast on that argument. Nor would publicity help to convince the court that "his sentence was unconstitutionally imposed . . . because of . . . the failure to use a jury in the sentencing process."[218] Again, all the publicity surrounding the trial could only serve to weaken this claim, especially because the failure to use a jury was probably viewed as a wise move by the court because of the potential difficulty in finding an impartial jury. Also, his claim that "the sentence imposed in this case was disproportionate" would again not be helped at all if any judge had even heard a whisper about the articles describing the last moments of Robert's life.[219]

However, in 1995, in his second appeal for post-conviction relief, Stuart came before the court alleging a different kind of claim, a *Youngblood* claim.[220] This time Stuart argued that the state acted in bad faith in concealing evidence that it had tape recorded a conversation between Stuart and his sister while he was in custody.[221] Had that evidence been released, Stuart might have been able to suppress the testimony of some key witnesses at his trial. For the first time, instead of the media circus surrounding his case working against him, all of the publicity may have worked in his favor. All of the hype in what Mr. Kinney described as a "small town" could have made it more likely in the eyes of the court that the police who lived and worked there had knowledge of what they were doing in concealing the evidence.[222]

When interviewed, Mr. Kinney said that Stuart had been continually "hammering at the door" of the Supreme Court of Idaho but did not win until 1995 on the *Youngblood* claim.[223] This situation highlights the fact that *Youngblood* is a different type of claim, one that can require examining the intent of a state actor. For years, all the attention given to the gruesome details of the case seemed to have been detrimental to Stuart. However, Stuart's attorney's focus on publicity and request for a change of venue may have actually helped the defendant to ultimately win on an important claim.

Although the issue of publicity was not addressed in *Yevakpor* as it was in *Stuart*, publicity may have had some bearing on the verdict. Kofi Yevakpor, the defendant, is a well-known Canadian runner and former member of the Canadian Olympic Team.[224] He competed for Canada in 2000 and also competed

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217 *Stuart*, 715 P.2d at 838.

218 *Id.*

219 *Id.*

220 Stuart v. State, 907 P.2d 783 (Idaho 1995).

221 *Id.* at 786.

222 Telephone Interview with Robert Kinney (Apr. 7, 2005).

223 *Id.*

224 CanadianRunner,http://www.canadianrunner.com/content/view/8083/2/; http://www.accessnews.com/modules/wfsection/article.php?articleid=8371 (last visited Jan. 8, 2007).

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for Ghana in track and field at the 1992 Summer Olympics. An interview with Mr. Gene Primino and a cursory inspection of newspaper archives both reveal that there was also a good deal of attention focused on the amount of heroin that Yevakpor was allegedly attempting to smuggle.[225] Mr. Yevakpor was found with six pounds of heroin, valued at more than $600,000.[226]

B. Characteristics of the Evidence

Bohl is one of the most cited cases for the *Youngblood* bad faith issue, yet it is a case that involves one of the most unique types of evidence ever considered by a court doing a *Youngblood* analysis.[227] *Yevakpor* is a case that involves a type of evidence that is increasingly prevalent in today's society and that is becoming easier to preserve due to technological advances. Both cases demonstrate how characteristics of the destroyed evidence, such as the size of the evidence, the ease with which the evidence could have been saved, and the reliability and omnipresence of the evidence, may affect a court's *Youngblood* analysis.

1. Size of Evidence

Most destruction of evidence claims involve alleged controlled substances, clothing, or weapons. Bohl and Bell, however, were charged with using nonconforming steel in manufacturing radio transmission towers for the FAA.[228] The towers in question were four hundred feet, ninety feet, and forty-five feet high.[229] These towers constitute physical evidence of a scale much larger than that usually found in *Youngblood* cases.

When interviewed, James Lang, who served as Bell's attorney, said that he believed part of the reason for the destruction was that the government did not properly track the towers because they were so large. He believed that the government did not know what to do with the massive structures.[230]

However, the size of the evidence resembles the publicity issue in that it also can either hurt or help the defendant. It is possible that the government in *Bohl* did not know what to do with the evidence, and as a result, carelessly lost it. That would certainly hurt Bohl and Bell. However, there is also the possibility that, because of the immense size of the structures, the court found it difficult to believe that the government could *not* know where the evidence was at all

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225 *See, e.g.*, Six Pounds of Heroin Seized at Border, http://www.wstm.com/Global/Story.asp?S=4003006 (last visited Jan. 8, 2007); telephone interview with Gene Primomo (Aug. 14, 2006).

226 Six Pounds of Heroin Seized at Border, *available at* http://www.wstm.com/Global/Story.asp?S=4003006; telephone interview with Gene Primomo (Aug. 14, 2006).

227 Arizona v. Youngblood, 25 F.3d 904 (10th Cir. 1994).

228 *Id.* at 908-09.

229 *Id.* at 907.

230 Telephone Interview with James Lang (Mar. 4, 2005).

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times. The smallest tower stood forty-five feet in height, and anything that large would, to any reasonable judge, seem extremely difficult to lose.[231] When asked whether he believed that the size of the towers influenced the court's finding of bad faith, John Dowdell, attorney for Bohl, replied, "absolutely," and emphasized how all three were very large, had three legs each, and came with many different kinds of equipment. He also emphasized that the evidence here wasn't just a drop of blood, but rather three massive towers.[232]

The foregoing is not meant to suggest that *Bohl* is not useful in cases involving evidence that is more like a drop of blood than a massive tower. Instead, *Bohl* highlights that it might be worthwhile to focus on the unique features of missing evidence.

2. Ease with which Evidence can be Saved

In *Yevakpor*, the defendant challenged the introduction of video surveillance tapes by the government.[233] The agents had "cherry-picked" certain segments of video footage to save to the exclusion of the rest of the footage.[234] Amongst the court's many criticisms of the government's behavior was the argument that this type of evidence could have easily been saved.[235] The court described the process of saving surveillance video as "a relatively easy and inexpensive task considering that the video can be saved to compact disc."[236] Moreover, the court found that the actions of the agents in sifting though the material and deciding which samples to remove was actually a more difficult task requiring more time and effort than just saving it in its entirety.[237] *Yevakpor* demonstrates then, that in a world of alleged negligently or accidentally spoiled DNA, semen, and clothing samples, destruction of surveillance videotapes and other types of evidence that can easily be saved can not be so easily explained or tolerated.

3. Reliability and Omnipresence of the Evidence in Today's Society

Another criticism by the court in *Yevakpor* involves the growing importance and reliability of video surveillance. In rejecting the state's argument that the shorter preserved video segments were comparable to "snapshot photograph[s]," the court found that surveillance is conducted today with video rather

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231 *Id.*

232 Telephone Interview with John Dowdell (Apr. 27, 2005).

233 United States v. Yevakpor, 419 F. Supp. 2d 242, 252 (2006).

234 *Id.*

235 *Id.*

236 *Id.* at 246-47.

237 *Id.* at 247.

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than photography precisely because video is an important and reliable means of surveillance because it offers an entire picture.[238] The court held "the video recordings provide a more complete picture of events, a continuous stream of information, with less risk of scenes being taken out of context."[239] The agents eliminated the benefit and reliability of a full video recording by only preserving certain segments. Furthermore, the court argued that with an increasing amount of surveillance taking place in the United States, government agents are under an even greater obligation to fully preserve surveillance evidence.[240] In today's society, surveillance, or the threat of surveillance, seems omnipresent, both as a growing source of security for the government and as a concern for a number of private individuals. The court emphasized the prevalence of surveillance and thus the importance for surveillance to be properly preserved.[241] For more agents to act with the disregard of those in *Yevkapor* would pose a grave danger to liberty. The court held:

> Given the current state of affairs in our nation, when surveillance occurs both with and without our knowledge, a great danger to liberty would exist if Government could pick and choose segments of recordings for use in prosecution, destroy the remainder, and then argue that the defense must show that the destroyed evidence contained exculpatory or otherwise potentially useful and relevant information.[242]

Thus, destruction of evidence that is collected precisely because of its reliability may subject government agents to greater scrutiny by courts.

Numerous forms of evidence are collected in criminal cases by government agents. However, cases involving certain types of evidence and evidence with certain characteristics may make a court more inclined to find that there was bad faith destruction. A defendant should consider whether he can highlight the unique or important nature of the destroyed evidence, including whether the evidence was large in size, whether the evidence could have been easily saved by the government, and whether the evidence has a special status because it is known to be reliable and prevalent in society.

C. Incomplete or Missing Portions of Evidence

Part II of this Article introduced two bad faith cases in which incomplete evidence was turned over by the state. Both of those cases, *Stuart* and

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238 *Id.* at 246.

239 *Id.*

240 *Id.* at 252.

241 *Id.*

242 *Id.*

Yevakpor, were then juxtaposed with similar but opposing cases where bad faith was not found and were thus revealed as not particularly unique or anomalous.[243] Part II of this Article notwithstanding, something should be said for the effect that incomplete evidence has on bad faith determinations. While incomplete or missing portions of evidence has failed to lead courts to make findings of bad faith in a number of cases, in two out of the seven successful cases courts have found missing portions of evidence to be indicative of bad faith.[244] Incomplete or missing evidence may alert a court that there has been a bad faith destruction.

At issue in *Stuart* were missing portions of telephone logs of Stuart's conversations with various individuals.[245] The state turned over its phone logs with missing entries.[246] The court found bad faith because although the state did not attempt to hide the entire phone logs themselves, it did destroy at least one entry and likely more individual entries and calls within the phone logs.[247] The court held that "although the prosecution did not conceal the existence of the phone logs, it did conceal the existence of the tape-recording of Stuart's phone call to his sister which, if disclosed, would have inevitably led to further discovery regarding the sheriff's surreptitious tape-recording."[248]

Yevakpor involved the selective preservation by the government of approximately three minutes of video footage to the exclusion of approximately twenty-two minutes of additional footage.[249] Again, the court found the fact that the evidence was preserved, but not in its complete form, demonstrated bad faith.[250] The court had strong words for government agents who may in the future attempt to pick certain portions of evidence to save and others to destroy. Immediately following its *Youngblood* discussion, the court stated, "From this point forward, let all parties - Government and Defense alike - be on notice: if selected segments of a video or audio exhibit will be offered at trial, the entire video or audio exhibit had best be preserved . . . . Simply put, the Government cannot make use of video segments that have been 'cherry-picked' when the remainder of the recording has been erased or recorded-over subsequent to defendant's arrest."[251]

In an interview, Gene Primomo, defendant Yevakpor's attorney, said that he believed that the success of the case turned on the fact that the govern-

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243 *Supra* Part II.

244 The two cases are *Stuart* and *Yevakpor*.

245 Idaho v. Stuart, 715 P.2d 783, 786-87 (1995).

246 *Id.* at 787.

247 *See id.* at 791.

248 *Id.* at 793.

249 United States v. Yevakpor, 419 F. Supp. 2d 242, 252 (2006).

250 *Id.*

251 *Id.*

ment preserved only a portion of the evidence.[252] Mr. Primomo noted that once it was clear that there was a "hole" in the evidence and that the government was responsible for the missing portions, the court decided that it was best to exclude all of the evidence.[253] He believed the major issue in the case was that the government "had it all, but chose not to keep it all."[254]

Incomplete or missing evidence may strengthen a defendant's *Youngblood* claim. The fact that some portions of evidence were saved to the exclusion of others, all within the discretion of state actors, may not sit well with courts and may influence a court's issuance of a bad faith ruling.

D. Putting the State on Notice that Evidence Must be Saved

Cooper and *Bohl* were cases in which the state was put on notice that the defendants requested access to (and preservation of) specific evidence. In *Cooper*, the government seized vats that were supposedly used for the manufacture of methamphetamine.[255] Mr. Samuel, Cooper's attorney, said that he believed that the letters requesting the evidence filed by defendant Gammill's attorney were important in demonstrating bad faith.[256] In *Bohl*, the state seized three radio transmission towers, and the defendants' repeatedly asked for access to them.[257] Mr. Dowdell, Bohl's attorney, also felt that the giving of notice was extremely important and influenced the court's *Youngblood* finding.[258]

The *Bohl* court explicitly discussed the notice issue by saying, "In evaluating the good or bad faith of the government when it disposed of this evidence, we note first that the government was explicitly placed on notice that Bell and Bohl believed that the tower legs were potentially exculpatory."[259] Mr. Samuel discussed the importance of the notice issue and said that he believed the letter to the state was extremely important evidence for the *Cooper* court and that it angered the court about the situation so much that it made a finding of bad faith.[260] Based on these cases, if the state is placed on notice that evidence is requested and the state not only ignores the request but also proceeds to destroy the materials, the defendant may have a good case for bad faith.

After being told about the Supreme Court's holding in *Fisher*, which effectively dictates that destruction of evidence in defiance of a discovery motion does not amount to bad faith, both Mr. Samuel and Mr. Dowdell said that they

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252 Telephone Interview with Gene Primomo (Aug. 14, 2006).

253 *Id.*

254 *Id.*

255 United States v. Cooper, 983 F.2d 928, 930 (9th Cir. 1992).

256 Telephone Interview with Dwight Samuel (Mar. 25, 2005).

257 *See* United States v. Bohl, 25 F.3d 904, 908 (10th Cir. 1994).

258 Telephone Interview with John Dowdell (Apr. 27, 2005).

259 *Bohl,* 25 F.3d at 911.

260 Telephone Interview with John Dowdell (Apr. 27, 2005).

believe the notice given in their cases was more than the pre-trial discovery motion in *Fisher*.[261] In *Cooper* and *Bohl* there were direct communications made by the defendants or their attorneys to the state.[262] Mr. Dowdell believes that even if *Fisher* had been decided before *Bohl*, bad faith still would have been found because there was repeated notice given to the state, not just a discovery request.[263]

Both attorneys believe that requesting access to evidence from the beginning and ensuring that it is not destroyed is a precaution of which all lawyers must be aware.[264] However, there are attorneys who will be dealing with *Youngblood* claims who have not had the privilege of working on the case from the pre-trial phase. For those lawyers, the attorneys and these cases themselves suggest that after destruction has occurred, emphasizing the fact that the state was put on notice (if it was actually given notice) can make all the difference for *Youngblood* claims.

E. Recklessness or Extreme Negligence

Many courts that have conducted *Youngblood* inquiries have found that reckless or grossly negligent behavior does not amount to bad faith. There are so many cases that stand for this proposition that it could almost seem futile to argue that the state acted recklessly or in a grossly negligent manner. However, *Elliott* is a case where a court found that exactly that kind of behavior does amount to bad faith.[265]

There are numerous examples of courts finding that reckless or grossly negligent behavior does not demonstrate bad faith. For example, in *United States v. Jobson*, even though the court strongly "disapprove[d] of the government's dilatory response to defendant's discovery requests" that resulted in destruction of evidence despite those requests and although the police actions were negligent and "perhaps even grossly negligent," the court did not find bad faith.[266] In *Montgomery v. Greer*, a rape victim identified her attacker from an array of loose photographs, but the police failed to record which photographs they showed her and only retained the photograph of the defendant.[267] Although the court described the behavior of law enforcement as "unprofessional" and "slip-shod," it found that "mere negligence, without more, does not amount to a

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261 Telephone Interview with Dwight Samuel (Mar. 25, 2005); Telephone Interview with John Dowdell (Apr. 27, 2005).

262 *Cooper*, 983 F2d 928, 931 (9th Cir. 1992); *Bohl*, 25 F.3d at 911.

263 Telephone Interview with Dwight Samuel (Mar. 25, 2005).

264 *Id.*; Telephone Interview with John Dowdell (Apr. 27, 2005).

265 United States v. Elliott, 83 F. Supp. 2d 637 (E.D. Va. 1999).

266 United States v. Jobson, 102 F.3d 214 (6th Cir. 1996).

267 Montgomery v. Greer, 956 F.2d 677, 681 (7th Cir. 1992).

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constitutional violation."[268] In *United States v. Vera*, the court found that although the government's destruction of methamphetamine samples was reckless and grossly negligent, the destruction did not rise to the level of "connivance" required for bad faith.[269] Upon review of these cases and many others like them, claims by government agencies that evidence was lost due to recklessness or negligence would appear to give the government a free pass when defending against bad faith allegations.

For this reason, *Elliott* is unique and a beacon of hope for defendants arguing that a reckless or negligent destruction meets the bad faith standard.[270] Unlike many others, the court in *Elliott* found that destruction resulting from grossly negligent and/or reckless behavior by a state actor is bad faith.[271] In *Elliott*, after the police found evidence they believed to be methamphetamine in the defendant's vehicle and tested it for fingerprints, a state agent destroyed the evidence and in so doing failed to follow established procedure.[272] The behavior of the DEA agent is not dissimilar to the behavior of the officers in the three cases discussed above. The court noted:

> [T]he DEA Agent here authorized the destruction of valuable evidence within hours of its seizure, based on his unsubstantiated assumption that the items were contaminated, and without first conferring with a chemist and in contradiction to the rather plainly worded regulations requiring the preservation of evidence for due process purposes.[273]

Even though his actions could be considered merely grossly negligent and/or reckless, his actions sufficiently outraged the court so that it made a finding of bad faith.[274]

Thus, despite overwhelming evidence that courts refuse to find due process violations when the state acts negligently or recklessly, *Elliott* can serve to give hope to attorneys where there is evidence of negligence or recklessness but no proof as to whether there was actual malice in the mind of the state actor. At times, emphasis on the careless actions of the state just might work.

There are a number of case-specific reasons for the success of the seven aforementioned cases. Although referred to as "case-specific," these factors are not only pertinent to these individual cases but also may aid new defendants bringing *Youngblood* claims. As explained in Part III, these successful cases are

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268 *Id.*

269 United States v. Vera, 231 F. Supp. 2d 997, 1001-02 (D. Or. 2001).

270 *See Elliott*, 83 F. Supp. 2d 637.

271 *Id.* at 640.

272 *Id.*

273 *Id.* at 647.

274 *Id.*

more ordinary than may be realized at first glance, and defendants bringing *Youngblood* claims should look to these case-specific lessons to possibly strengthen their own arguments.

V. COMMON THREADS RUNNING THROUGH THESE CASES

In addition to the case-specific observations, there are also two common themes that run through the successful cases. The courts that made bad faith rulings focused on the materiality of the destroyed evidence and looked to the state for an explanation of the destruction. An emphasis on these two themes may aid defendants bringing destruction of evidence claims.

A. *The Courts Focus on the Materiality of the Evidence*

Before *Youngblood* was decided, a number of courts had been using a standard that weighed the materiality of the destroyed potentially exculpatory evidence to determine whether a due process violation had occurred. However, in *Youngblood* the Supreme Court created a new standard that only focused on "bad faith" and made no mention of materiality.[275] As a result, both the concurring and dissenting justices in *Youngblood* expressed their disapproval of the new bad faith standard.[276] They believed the test was derived from an incorrect analysis of past cases and that it was an inappropriate requirement. Both justices suggested that a better standard would be to look to the materiality of the destroyed evidence. The courts of most of the successful bad faith cases echo that sentiment by nonetheless discussing materiality in their bad faith inquiries. The successful cases suggest that despite the *Youngblood* decision and the bad faith standard, some courts still turn to materiality in destruction of evidence claims.

In his *Youngblood* concurrence, Justice Stevens explained why examining the value of evidence is a more pertinent inquiry than bad faith. He said, "In my opinion, there may well be cases in which the defendant is unable to prove that the State acted in bad faith but in which the loss or destruction of evidence is nonetheless so critical to the defense as to make a criminal trial fundamentally unfair."[277] Similarly, in his dissent, Justice Blackmun expressed the same idea and created what he believed to be a better standard. He said:

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275 Arizona v. Youngblood, 488 U.S. 51, 61 (1988).

276 *Id.* ("In my opinion, there may well be cases in which the defendant is unable to prove that the State acted in bad faith but in which the loss or destruction of evidence is nonetheless so critical to the defense as to make a criminal trial fundamentally unfair.") (Blackmun, J., dissenting); *id.* at 66 ("In the same way, it makes no sense to ignore the fact that a defendant has been denied a fair trial because the State allowed evidence that was material to the defense to deteriorate beyond the point of usefulness.").

277 *Id.*

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> Rather than allow a State's ineptitude to saddle a defendant with an impossible burden, a court should focus on the type of evidence, the possibility it might prove exculpatory, and the existence of other evidence going to the same point of contention in determining whether the failure to preserve the evidence in question violated due process.[278] To put it succinctly, where no comparable evidence is likely to be available to the defendant, police must preserve physical evidence of a type that they reasonably should know has the potential, if tested, to reveal immutable characteristics of the criminal, and hence to exculpate a defendant charged with the crime.[279]

For both justices, the loss of unique and incomparable evidence is a violation of the defendants' due process rights.

The judges in most of the seven successful cases also focused on the materiality of the lost evidence. Four of the courts – *Cooper, McGrone, Elliot,* and *Benson* – were obliged to discuss materiality because they used the combined *Trombetta/Youngblood* test for determining whether destruction of evidence was a due process violation. For courts that have adopted the hybrid standard, a defendant must show: (1) an "exculpatory value that was apparent before the evidence was destroyed," (2) that the defendant would be "unable to obtain comparable evidence by other reasonably available means," and (3) bad faith by the government.[280] The second factor asks courts to weigh the materiality of the evidence, and the third asks courts to make a separate bad faith finding. Thus, these courts had no choice but to consider materiality. However, it is important to note that the four courts gave more consideration to the materiality issue than the other *Trombetta/Youngblood* factors. Materiality was more than a requirement for the courts that used the *Trombetta/Youngblood* analysis; it was their paramount concern. For example, in *Cooper* the court discussed at length why there was no reasonably available evidence that would be comparable to the destroyed lab equipment.[281] The other two factors were barely discussed.[282] Furthermore, the materiality factor influenced and carried over to the court's distinct examination of the bad faith factor. Also, in *McGrone*, the court made a finding of bad faith purely based on the fact that the state deprived the defendant of material evidence. The court explained that the police officers' failure to appear at trial served to "negate the only means the defendant had for proving a due process violation due to the destruction of evidence under *Trombetta* and

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278 *Id.* at 69.

279 *Id.*

280 California v. Trombetta, 467 U.S. 479, 489 (1984); *Youngblood*, 488 U.S. at 56-58; s*ee also* Bawden, *supra* note 7, at 346.

281 United States v. Cooper, 983 F.2d 928 (9th Cir. 1993).

282 *Id.*

Youngblood," and that action was enough to amount to bad faith.[283] Thus, *McGrone* demonstrates that a court's examination of the materiality factor in the *Trombetta/Youngblood* test can affect its examination of the bad faith factor.

Furthermore, even two courts that did not use the combined *Trombetta/Youngblood* test and only used the *Youngblood* analysis (which requires only a determination of whether there was "bad faith") could not resist emphasizing the materiality of the lost evidence. For example, in *Bohl*, although the court only conducted a *Youngblood* bad faith analysis, it still made note of the importance of the destroyed towers.[284] The court said, "the evidence disposed of here was central to the government's case" and "nothing was more probative on the issue of the steel composition of [the] towers than the towers themselves."[285] Thus, the court still gave a great deal of weight to the fact that the evidence was irreplaceable. Similarly, the court in *Stuart* only considered whether there was bad faith destruction but nevertheless emphasized the materiality of the lost evidence.[286] The court explained that if only the phone conversation between Stuart and his sister had been disclosed, Stuart could have gained access to the entire phone record and possibly suppressed it. The court said, "but for the nondisclosure of [Stuart's conversation with his sister], the phone logs . . . would undoubtedly have been preserved."[287] Thus, the court stressed how central the phone conversation was to the outcome of the case.[288]

The successful cases indicate that materiality can still be an influential factor in bad faith determinations. Like the concurring and dissenting justices in *Youngblood*, the courts that have made findings of bad faith could not resist being drawn into discussions of the importance of the missing evidence. A defendant may do well to bring the materiality of the destroyed evidence to the court's attention.

B. The Courts Ask the State to Explain the Destruction of Evidence

The burden of proving bad faith is usually understood to rest solely with the defendant. In *Youngblood* the Court held, "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law."[289] The Court only discussed the duty of the defendant and made no mention of whether a state would be required to offer an innocent explanation for destruction in order to

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283 State v. McGrone, 798 So. 2d 519, 523 (Miss. 2001).

284 United States v. Bohl, 25 F.3d 904, 912 (10th Cir. 1994).

285 *Id.*

286 Idaho v. Stewart, 907 P.2d 783, 791 (1995).

287 *Id.*

288 *Id.*

289 Arizona v. Youngblood, 488 U.S. 51, 61 (1988).

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demonstrate good faith or a lack of bad faith.[290] Thus, a reading of *Youngblood* suggests that a court's "camera" is supposed to remain focused on the defendant.[291] However, in most of the successful cases the courts' cameras stray from the defense and turn to the government. The cases reveal that some courts shift their focus to the state and can be so angered or puzzled by what they see that they make a finding of bad faith.

McGrone is one of the strongest examples of a court that makes a finding of bad faith after shifting the camera to the state. In *McGrone*, the court focused almost exclusively on the government's lack of explanation for the destruction of the evidence. The court did not even weigh the defendant's evidence of bad faith. In fact, the court said that McGrone was unable to "presen[t] proof on this issue" because his main argument could only be refuted by the police officers who did not appear at trial.[292] Thus, without discussing the merit of McGrone's argument, the court looked at the state's lack of argument or explanation and took that as evidence of bad faith.[293]

The court in *Bohl* similarly shifted its camera to the state.[294] Although the court in *Bohl* discussed the defendant's evidence of bad faith, it also discussed in depth the fact that the government did not offer an innocent explanation for its behavior.[295] It took care to note that "the government offers no innocent explanation for its failure to preserve the steel which formed the core of its criminal case against Bell and Bohl," and that "the government here offers no reasonable rationale or good faith explanation for the destruction of the evidence."[296] In fact, the entire finding of bad faith could have been different had the government just offered some justification. The court said that if the government had an excuse, it could counter the evidence of bad faith.[297] The court said, "even if the government destroys or facilitates the disposition of evidence knowing of its potentially exculpatory value, there might exist innocent explanations for the government's conduct that are reasonable under the circumstances to negate any inference of bad faith."[298] Without that innocent explanation, however, the court found that the state had engaged in a bad faith destruction of the evidence.[299]

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290 *Id.*

291 *Id.* at 69.

292 State v. McGrone, 798 So. 2d 519, 523 (Miss. 2001).

293 *Id.* at 523-24.

294 *See also* Bawden, *supra* note 7 at 352-53 (discussing a "rebuttable presumption" approach taken by the court in *Bohl*).

295 *Id.*

296 United States v. Bohl, 25 F.3d 904, 912-13 (10th Cir. 1994).

297 *Id.* at 913.

298 *Id.*

299 *Id.*

Elliott continues the theme of a court shifting its camera to the state.[300] In *Elliott*, the court held that the defendant's argument for bad faith was meritless and instead examined the state's evidence of good faith.[301] The defendant in *Elliott* argued that the DEA agent in the case acted in "subjective bad faith" because he spoke to the defendant with crude language and acted in a threatening manner.[302] However, the court found there was no merit to the defendant's argument because the harsh words from the agent occurred almost three weeks after the destruction of the evidence.[303] After rejecting the defendant's explanation of how the state acted in bad faith, the court turned to the state's explanation of how it acted in good faith.[304] The state argued that its agents were following DEA and Department of Justice policies. However, the court found that the agents had actually acted contrary to established policy and therefore had acted in bad faith.[305] The court's determination of bad faith then rested solely on the government's argument and not on the defense's.[306]

Yevakpor is yet another example of a court that shifted its camera and turned to the government for an explanation for missing evidence.[307] In *Yevakpor* the court looked to the state for an explanation of the destruction of twenty-two minutes of surveillance video of the defendant. The court found the response to be unsatisfactory. The government argued that the destruction was in accordance with agency routine and policy.[308] The court quickly rejected the state's defense, finding that the government was on notice that discoverable evidence must be preserved.[309]

The decision contains no further justification by the government for its destruction of twenty-two minutes of surveillance footage of the defendant and preservation of only three minutes.[310] The lack of an in-depth discussion in the record of the government's defense is probably due to the fact that during court proceedings the government lacked a concrete explanation. Mr. Primomo reports that when the U.S. Attorney was asked by the court why the missing portions were removed, he did not have an explanation and essentially had to "shrug his shoulders."[311]

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300 United States v. Elliott, 83 F. Supp. 2d 637 (E.D. Va. 1999).

301 *Id.* at 644.

302 *Id.*

303 *Id.* at 644-45.

304 *Id.*

305 *Id.*

306 *Id.*

307 United States v. Yevakpor, 419 F. Supp. 2d 242, 247 (N.D.N.Y. 2006).

308 *Id.*

309 *Id.*

310 *Id.*

311 Telephone Interview with Gene Primomo (Aug. 14, 2006).

Perhaps the most straightforward demonstration of the government's burden is in *Benson*.[312] In *Benson*, the court said that under a *Youngblood* analysis it must consider "whether the state acted in good faith."[313] Framing the issue as whether the state acted in "good faith" rather than whether the state acted in "bad faith" creates a subtle but important shift in the burden. A defense of good faith destruction rests solely on the government, not the defendant, and the government must provide an innocuous reason for the loss of evidence or else fail the *Youngblood* analysis.

The successful cases indicate that in bad faith cases the pressure is not always only on the defendant. Even defendants with meritless cases can sometimes demonstrate bad faith by turning the tables and pointing to inadequacies in the government's case. As some attorneys suggested when interviewed about these cases, angering the court about the state's lack of explanation (or the state's poor excuse) may be sufficient to prove bad faith.

VI. CONCLUSION

The *Youngblood* bad faith destruction of evidence standard is a difficult standard to satisfy, but not an impossible one. Out of over one thousand reported cases that have cited to *Youngblood* to date, there are seven where courts have found bad faith destruction of evidence by the government. These seven are not outliers or strange occurrences but instead are the types of claims that attorneys deal with every day. Each can be contrasted with a similar case that was unsuccessful in proving bad faith. These cases serve to give hope to defendants and attorneys bringing destruction of evidence claims and demonstrate that even the most ordinary of cases can bring about an extraordinary outcome – a finding of bad faith destruction of evidence, and thus a ruling that there has been a due process rights violation.

There are a number of lessons to be learned from the successful cases, based on both case-specific observations and common threads that run throughout the seven. The lesson to be learned from each case is that the level of publicity involved, the characteristics of evidence at issue, incomplete or missing evidence, notice to the state through requests from the defendant that the evidence should be preserved, and the degree of recklessness or extreme negligence by the government, all may be considerations that can prove helpful to defendants bringing a *Youngblood* claim.

Common threads tying the successful cases together include an emphasis on the materiality of the destroyed evidence and a focus on the state's lack of

312 State v. Benson, 788 N.E. 2d 693 (Ohio Ct. App. 2003).

313 *Id.* at 696.

explanation for the destroyed material, indicating that both factors may compel a court to make a finding of bad faith.

Perhaps the most important message from the successful cases, though, is one of possibility. They stand for the proposition that successfully arguing a *Youngblood* claim is an attainable, if difficult, goal.

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